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No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

BRIEF OF COLORADO DISTRICT ATTORNEYS' COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Colorado District Attorneys' Council (CDAC) is a statewide organization representing the elected District Attorneys throughout the state. Statutorily created in 1977 by Colorado Revised Statutes §§ 20-1-110, 20-1-111, CDAC currently represents twenty-one of the twenty-two District Attorneys' offices in Colorado, including the 18th Judicial District from which this case originated.

The CDAC's mission is to promote and encourage effective administration of criminal justice in Colorado. To that end, CDAC provides centralized prosecution-related services to Colorado's District Attorneys, including training of personnel, legislative drafting and liaison, legal research, management assistance, case tracking data and safeguarding, and dissemination of data to other criminal justice agencies.

CDAC—representing state prosecutors from across Colorado—has a strong interest in promoting finality in jury verdicts, shielding those verdicts from impeachment, and protecting jurors from harassment and coercion. Accordingly, CDAC urges the Court to affirm the Colorado Supreme Court's decision. Reversing the decision below would undermine the longstanding no-impeachment rule and improperly invade the sanctity of the jury deliberation room.

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Colorado Rule of Evidence 606(b), like its federal counterpart, prohibits a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." The rule's importance is obvious. Post-verdict scrutiny of deliberations deters "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in the system that relies on laypeople." *Tanner v. United States*, 483 U.S. 107, 120-21 (1987). "Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict," moreover, "seriously disrupt the finality of the process." *Id.* at 120.

Sixth Amendment challenges to this rule thus have been rejected since *Tanner* decided the question nearly thirty years ago. As the Court noted in *Tanner*, "investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior." *Id.* But it was "not at all clear ... that the jury system could survive such efforts to perfect it." *Id.* The Court recognized, furthermore, that allowing the perfect to be the enemy of the good would be especially unwise here given the multiple procedural protections that ensure against juror bias seeping into deliberations. "The suitability of an individual for the responsibility of jury service," for example, "is examined during voir dire." *Id.* at 127. And "jurors are observable by each other, and may report inappropriate juror behavior *before* they render a

verdict." *Id.* With these protections firmly in place, the Court determined that post-verdict litigation probing of juror deliberations was unwarranted.

Petitioner's plea to overrule *Tanner* with regard to racial bias should be rejected. Although he tries, Petitioner cannot identify a neutral basis for creating this special exception. For example, Petitioner claims that the settled understanding that "voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994), does not apply to claims of racial bias. But that assertion is difficult to reconcile with the Court's holding that a defendant's right to an impartial jury may be violated when a trial court prohibits him from probing racial bias during voir dire. *See Aldridge v. United States*, 283 U.S. 308 (1931). The constitutional foundation for this requirement would be far from clear if voir dire, as Petitioner now claims, cannot identify a prospective juror's racial bias.

Petitioner's claim that racial bias is special because prospective jurors are uniquely embarrassed to disclose it lacks factual support. All of the sources upon which he relies explain how jurors are hesitant to admit *any* bias in court. Petitioner's claim that courts are uniquely reluctant to permit questions on racial bias during voir dire also lacks empirical support. Courts in many states, including Colorado, routinely permit such questioning. Indeed, this Court has used its supervisory power to set a low bar for requiring it. *See Rosales-Lopez v. United States*, 451 U.S. 182, 191 n.7 (1981). In short, there is no support for the argument that racial bias is immune from

the primary tool courts have long relied upon to uncover all types of potentially prejudicial attitudes and beliefs on the part of jurors.

The same goes for juror reporting. Jurors spend all day (and sometimes night) together during a trial. Thus, they are positioned to perceive bias in their fellow jurors and to report it to the court. Petitioner's attempts to argue otherwise when it comes to race fall short. According to Petitioner, jurors may not even know that racial bias is impermissible. But even if that were true—which is doubtful in light of the many cases in which jurors have reported racial bias to courts—that also would be true of gender bias, religious bias, or, for that matter, nearly any type of bias. If that problem exists, it can be cured through more specific jury instructions; it is not some special problem that exists only in the context of racial bias.

Petitioner's supposition that a juror is uniquely unlikely to report racial bias because doing so requires him to "formally accuse another juror of being racist" and to confront that juror "from the witness stand" suffers from the same flawed logic. There is no reason to believe jurors are more apprehensive to level a charge of racial bias than a charge of gender or religious bias—or any other type of juror bias or misconduct. Moreover, Petitioner distorts how trial judges respond to reports of misconduct from the jury room. In most instances, the court will question the jurors individually; there is no trial-like confrontation with the accused juror to fear. Here too, then, there simply is no distinction between reporting racial bias and all other instances of juror misconduct.

The consequences that would result from adopting Petitioner's proposed rule confirm its imprudence. The Constitution guarantees *all* criminal defendants the right to an impartial jury. Even just one biased juror—no matter the basis—can undermine that vital guarantee. Yet Petitioner asks this Court to rule that racial bias deserves protection afforded to no other category of bias—a distinction not found in the Sixth Amendment. Those criminal defendants who believe that the jury's verdict was infected by gender, nationality, or sexual-orientation bias thus would have fewer rights under the Sixth Amendment than other defendants. That should trouble the Court.

To be sure, the Court has acknowledged the odious nature of racial bias and its effect on criminal defendants. But it is equally true that bias based on gender, sexual orientation, and criminal history, for example, have similar significant effects on criminal trials. Petitioner responds that *Batson* shows that there is no line-drawing problem here as it has only been extended to gender-based peremptory strikes. But *Batson* proves the opposite. Lower courts continue to struggle to confine *Batson* to race and gender given that the rule's underlying reasoning applies equally to striking jurors based on their membership in any group. Indeed, some courts have extended *Batson* to peremptory strikes based on religion, ancestry, nationality, and sexual orientation.

Given the absence of any principled way to limit Petitioner's proposed rule to race, the Court is faced with a stark choice: stand by *Tanner* or overturn it. This should not be a tough choice. As the Court reiterated two years ago, *see Warger v. Shauers*, 135 S. Ct. 521 (2014),

Tanner was rightly decided, has not been undermined, and is still the only feasible way to ensure candor among the jurors. The Colorado Supreme Court's decision should be affirmed.

ARGUMENT

I. Petitioner Cannot Distinguish *Tanner*.

In *Tanner v. United States*, 483 U.S. 107 (1987), the Court upheld Federal Rule of Evidence 606(b) against a Sixth Amendment challenge. The Court unanimously reaffirmed that ruling in *Warger v. Shauers*, 135 S. Ct. 521 (2014). As the Court has twice explained, a "defendant's right to an unimpaired jury [is] sufficiently protected by voir dire" and "the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered," *id.* at 529, including evidence from jurors who "report inappropriate juror behavior to the court," *Tanner*, 483 U.S. at 127. Although Petitioner accepts this general rule, he contends it should not extend to racial bias. But there is no basis for creating the special exception Petitioner proposes. All the objections he raises apply across the board to all forms of juror bias and misconduct. The Court therefore must reject Petitioner's argument or overturn *Tanner*.

A. Voir dire is a powerful tool that can root out all juror bias.

"[V]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Voir dire starts with

simple questions about jurors' "place of residence, age, marital status, occupation, and level of education." Tracy L. Treger, *One Jury Indivisible. A Group Dynamics Approach to Voir Dire*, 68 Chi.-Kent L. Rev. 549, 556 (1992). But from there, judges and lawyers can probe the jurors' religious and political beliefs, racial views, and even their drinking habits to evaluate jurors' fitness to serve. *See* Judge Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 Ky. L.J. 601, 610-14, 619, 627-28 (2004). This process, though often tedious, is one of the chief means of ensuring compliance with the Sixth Amendment.

Voir dire neutralizes jurors' biases in two primary ways. First, it "provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994). This protects a "defendant's right to exercise peremptory challenges," *Rosales-Lopez*, 451 U.S. at 188, which is "one of the most important of the rights secured to the accused," *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986). Second, voir dire ensures that judges may "remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." *Rosales-Lopez*, 451 U.S. at 188; *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (Brennan, J., concurring) (explaining that voir dire allows for "searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause.").

The Court has repeatedly recognized voir dire's key role in uncovering the biases of prospective jurors. Aside from generally declaring "that voir dire can be an essential means of protecting" the right to an impartial jury, *Warger*, 135 S. Ct. at 528-29, the Court has specifically explained that "[v]oir dire has long been recognized as an effective method of rooting out ... bias, especially when conducted in a careful and thoroughgoing manner." *Patton v. Yount*, 467 U.S. 1025, 1038 n.13 (1984) (quoting *In re Application of National Broadcasting Co.*, 653 F.2d 609, 617 (D.C. Cir. 1981)). In short, "[i]t is fair to assume that the method we have relied on since the beginning usually identifies bias." *Id.* (citing *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (Marshall, C.J.)).

Voir dire also counteracts bias by reminding jurors of their obligation to render impartial verdicts. Empirical research shows that bias is usually implicit. *See* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. Irvine L. Rev. 843, 860 (2015). Jurors can hold racial biases, for example, without knowing it. *Id.* Often, that unconscious bias is "at odds with conscious beliefs." *Id.* In the context of racial bias, voir dire forces prospective jurors to "think about their racial attitudes and ... about social norms against racial prejudice and institutional bias." Samuel R. Sommers & Phoebe C. Ellsworth, *The Jury and Race: How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997, 1027 (2003). "[R]ecent empirical research has shown that when race is made salient" through voir dire, among other methods, jurors "are more likely to treat similarly situated Black and White defendants the same way." Lee, *supra*, at 861. This is because one of the best ways "to overcome implicit racial

bias is to recognize its existence." *Id.* at 866. Or, as this Court has explained, "brief, general questions ... appear sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain." *Ham v. South Carolina*, 409 U.S. 524, 527 (1973).

Time and again, this Court has acknowledged that voir dire is an effective tool for exposing racial bias. Starting in *Aldridge v. United States*, 283 U.S. 308 (1931), the Court has held that defendants have a constitutional right in many instances to question jurors about race during voir dire. *Ham*, 409 U.S. at 527 ("[T]he essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that ... the [defendant] be permitted to have the jurors interrogated on the issue of racial bias."); *Turner v. Murray*, 476 U.S. 28, 36 (1986) ("In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized."). Accordingly, the Court has held that a case "may present circumstances in which an impermissible threat to the fair trial guaranteed by due process is posed by a trial court's refusal to question prospective jurors specifically about racial prejudice during Voir dire." *Ristaino v. Ross*, 424 U.S. 589, 595 (1976). That holding necessarily confirms that voir dire effectively neutralizes racial bias. Otherwise, after all, the constitutional right to a "fair trial" would not be jeopardized by a court's refusal to permit such questioning.

There is no reason to stray from these longstanding principles here. All forms of potential juror bias present Sixth Amendment concerns. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One

touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" (citation omitted)); *Murphy v. Florida*, 421 U.S. 794, 800 (1975) (describing an impartial juror as someone who can "lay aside his impression or opinion and render a verdict based on the evidence presented in court."). Thus, courts may disqualify prospective jurors if there is "a blood relationship between a party and the potential juror, a pecuniary interest in the outcome of the case, or prejudice [of any kind] against either party." Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. Rev. 501, 519 n.103 (1986). The Sixth Amendment right to an impartial jury does not expand or contract based on whether the bias is grounded in racial prejudice.

The courts that have held voir dire is inadequate at uncovering racial bias are unpersuasive. *See, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013). Unable to rely on empirical evidence, the argument amounts to *ipse dixit*. In *United States v. Villar*, for example, the First Circuit asserted as fact that "[w]hile individual pre-trial voir dire of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial bias." 586 F.3d 76, 87 & n.5 (1st Cir. 2009). But for support the court relied almost exclusively on a concurrence that had nothing to do with racial bias. *See id.* at 87 n.5 (citing *McDonough Power*, 464 U.S. at 558 (Brennan, J., concurring)). According to the concurrence, "the bias of a juror will rarely be admitted by the juror himself ... 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.'" *McDonough Power*, 464 U.S. at 558 (Brennan, J. concurring) (citation omitted). As a result,

bias "necessarily must be inferred from surrounding facts and circumstances." *Id.* But *McDonough Power* was a personal-injury case where a juror failed to disclose that his son had suffered an injury that could affect his impartiality. *See id.* at 549-50. The concurring opinion's statement about jurors' reluctance to admit bias thus referred to *all* forms of bias—not just race.

Petitioner fares no better. Rather than demonstrate that voir dire is uniquely ineffective at identifying racial bias, he mounts an attack against the very practice of voir dire. He first claims that jurors are more embarrassed to admit racial biases publicly than other forms of bias, which makes it more difficult to expose racial bias in voir dire. Pet. Br. 26-27. But the argument lacks factual support. Petitioner references two sources for the asserted proposition, *viz.*, that jurors are "less than candid when asked directly about their beliefs and attitudes, particularly in front of strangers in a group setting." *Id.* (quoting Thomas A. Mauet, Trial Techniques 44 (8th ed. 2010)); *id.* (citing for the same proposition Steven Lubet, Modern Trial Advocacy: Analysis & Practice 485-86 (4th ed. 2009)). Yet neither limits the assertion to racial bias. *See* Mauet, *supra*, at 44; Lubet, *supra*, at 485-86. In fact, the cited pages of both sources fail even to mention racial bias. *Id.* Petitioner's third source, a guide on jury selection, simply advises defense attorneys against asking jurors "directly" whether "they will be prejudiced by a party's race." Pet. Br. 26 (quoting James J. Gobert *et al.*, Jury Selection: The Law, Art and Science of Selecting a Jury § 7:41 (3d ed. 2015)). It instead advises that "the issue should be approached more indirectly" through "[o]pen-ended questions." *Id.* This, too, applies to any bias, as Petitioner's own sources explain. *See, e.g.*, Lubet, *supra*,

at 486 (advising against asking direct questions such as "[a]re you a responsible person?" because "[p]eople almost universally think of themselves as responsible, and those who do not are unlikely to admit it.").

The Professors of Law *amici* advance a similar claim, which they likewise fail to support. Professors of Law Br. 10-13. Most of the Professors' sources just explain that jurors may be unlikely to admit expressly that they hold any bias—not just racial biases. *See, e.g.*, Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 90-91 (2007) (relying on a study that found "[s]ome prospective jurors did not reveal to the court that close friends and family worked in law enforcement. Jurors who had been crime victims did not always admit it in court."); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 554 (1975) (explaining that "jurors are simply not aware of their prejudices or underestimate the impact of their biases on their ability to weigh the evidence."); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 Harv. J. Racial & Ethnic Just. 165, 201 (2011) ("Even if adequate trial mechanisms existed to discern juror biases pre-deliberation, not all jurors with material biases would disclose those biases."). A final source claims that people are unlikely to admit racial bias due to the fact that it is a socially undesirable position to hold. *See* Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison Across Three Contexts*, 62 Pub. Opinion Q. 506, 507-09 (1998). But that intuitive conclusion applies to any number of biases, such as gender, religious, or sexual-orientation bias, or even prejudice due to pretrial media coverage. *See, e.g.*, *Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959) ("It is too much to expect of

human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial.").

Regardless, even if jurors were somehow less likely to disclose publicly racial bias than other biases, there are ample tools to combat that problem. A judge can back up his admonition to answer questions truthfully with "the threat of contempt or perjury prosecutions" if jurors answer questions during voir dire untruthfully. *United States v. Benally*, 546 F.3d 1230, 1240 (10th Cir. 2008). For their part, jurors are free to request a sidebar so that they may address the issue in private. In Colorado, for example, an attorney may request *in camera* questioning "when an individual juror expresses embarrassment or requests to be questioned in private concerning a sensitive matter." 15 Colo. Prac., Crim. Prac. & Procedure § 17.24 (2d ed., 2015). The trial judge also may "conduct individual voir dire at the bench when appropriate." *Id.*; *see People v. Alexander*, 797 P.2d 1250, 1258-59 (Colo. 1990) (describing brief sidebar questioning of prospective jurors on a sensitive topic). And, counsel can request anonymous written questionnaires that include a question about racial bias. *See, e.g.*, Judge Roslyn O. Silver, *Mind Reading, Clairvoyance, and Jury Questionnaires*, Litigation, Fall 2004, at 70 ("Indisputably, these jurors fully revealed their racial beliefs and attitudes because they were comfortable that the answers would not be disclosed to the public."). Finally, courts can include information about implicit bias in their juror orientation materials. *See* Lee, *supra*, at 866-67. These avenues ensure that even if voir dire questioning does not reveal racial bias, such bias can be counteracted before the trial begins.

Petitioner responds that even if voir dire could in theory combat racial bias, in practice courts are hesitant to allow questioning on the topic. Pet. Br. 24. As noted above, however, the Constitution has been interpreted to require courts to allow questioning on racial biases in certain circumstances. *See Turner*, 476 U.S. at 36-37. It is enough to require questioning on potential racial bias if the defendant is black and the victim is white in a capital case, *see id.* at 36-37, or when racial issues are "inextricably bound up with the conduct of the trial." *Ristaino*, 424 U.S. at 597. Indeed, the Court has set a low bar for requiring this line of inquiry in federal courts. *Rosales-Lopez*, 451 U.S. at 191 n.7 (1981) ("[I]f the defendant claims a meaningful ethnic difference between himself and the victim, his voir dire request should ordinarily be satisfied."). "Most states" likewise "give trial counsel broad discretion in questioning prospective jurors to expose biases and predispositions affecting jurors' impartiality." Anne M. Payne & Christine Cohone, *Jury Selection & Voir Dire in Criminal Cases*, 76 Am. Juris. Trials 127, § 4 (2016). Colorado, in particular, has recognized "[t]hat voir dire inquiry is permissible into matters of racial prejudice in the interest of obtaining a fair and impartial jury." *Maes v. Dist. Court In and For City and County of Denver*, 503 P.2d 621, 624-25 (Colo. 1972).

But this is still insufficient, according to Petitioner, because even if counsel is allowed to inquire about racial bias, "counsel is well advised not to pose direct questions on the topic" because it "might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight." Pet. Br. 25 (quoting *Villar*, 586 F.3d at 87 n.5). As an initial matter, this claim is flawed because

"where the system allows, the zealous advocate [may] face[] an ethical and strategic imperative to raise issues of race during voir dire." Peter A. Joy, *Race Matters in Jury Selection*, 109 Nw. U.L. Rev. Online 180, 183 (2015); *see also Maes*, 503 P.2d at 625 ("It was counsel's duty to make diligent inquiry into the existence of potential prejudice that might exist in the jurors' minds by reason of petitioner's racial heritage."). Counsel's failure to do so can be detrimental to his client's interests as the threat of juror bias is seen as "most significant when bias is neither discussed nor otherwise injected into trial." West, *supra*, at 192; *see also* Lee, *supra*, at 861. But, like Petitioner's other objections, this concern is not confined to racial bias. Posing direct questions on racial bias is no more likely to insult jurors or raise an issue that defense counsel does not want to highlight than posing direct questions about any number of other biases. *See* Lubet, *supra*, at 486.

Ultimately, Petitioner's claim that racial bias is a significant factor in jury selection but that investigation into it can be postponed until after the trial is untenable. Such a regime defeats the purpose of voir dire, which is to "allow the defendant to evaluate the prospective jurors and select a fair and impartial jury," *United States v. Hayden*, 511 F. App'x 870, 872 (11th Cir. 2013), by "discerning bias or prejudice in potential jurors," *Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 258 (5th Cir. 1985). Petitioner understood he could challenge a prospective juror's racial bias during voir dire. But his counsel declined to do so. Pet. Br. 5-6 (describing voir dire as focusing on whether the prospective jurors could be "fair" or whether they had feelings "for or against" Petitioner). Petitioner should not be permitted to admit evidence of bias that his counsel failed even to attempt to elicit before trial started.

At base, Petitioner's request for a special rule for claims of racial bias is unsupportable. Without any support that racial bias is more difficult to reveal in voir dire than other forms of juror bias, Petitioner's argument must be seen for what it is: an attack on *Tanner*. But instead of revisiting *Tanner* a mere two years after reaffirming it, the Court should again hold that voir dire is a safeguard for ensuring an impartial jury.

B. Juror reporting before a verdict can remedy forms of juror bias not discovered during voir dire.

Tanner also held that Rule 606(b) safeguards a defendant's "Sixth Amendment interests in an unimpaired jury" because jurors "may report inappropriate juror behavior to the court before they render a verdict." 483 U.S. at 127. *Warger* reaffirmed that "juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered." 135 S. Ct. at 529. Petitioner is unable to offer a persuasive explanation for why this is true for all forms of juror bias and misconduct except racial bias.

As the Court has explained, "jurors are observable by each other" throughout the trial. *Tanner*, 483 U.S. at 127. They interact in the courtroom, during breaks and recesses, at lunch, outside of the courthouse, and during deliberations. *See, e.g.*, *United States v. Lawson*, 677 F.3d 629, 639 (4th Cir. 2012) (reporting a juror's consultation of an outside source in the jury room); *United States v. Henley*, 238 F.3d 1111, 1113 (9th Cir. 2001) (reporting a statement made while carpooling to and from the trial); *United States v. McClinton*, 135 F.3d 1178, 1184 (7th Cir.

1998) (reporting a statement made during a break in the courtroom); *United States v. Resko*, 3 F.3d 684, 686, 687 (3d Cir. 1993) (reporting juror misconduct while on a recess); *United States v. Juror No. One*, 866 F. Supp. 2d 442, 448 (E.D. Pa. 2011) (reporting how a juror sent inappropriate emails to other jurors). The opportunities for jurors to observe each other, of course, proliferate when they are sequestered. Because they spend so much time together, "[i]t is not unusual for jurors to develop personal relationships with each other." *United States v. Morrow*, 412 F. Supp. 2d 146, 173 (D.D.C. 2006). They become comfortable with each other and open up much more than they would with the judge. *See id.* (explaining how jurors celebrated the end of trial with an after-verdict picnic). As a consequence, jurors are especially likely to reveal potential biases to each other, which uniquely positions them to identify and report potential biases.

Petitioner makes three arguments as to why juror reporting is not an adequate safeguard when it comes to racial bias. All are unpersuasive.

1. First, he claims that "jurors may not realize that racially biased statements made during deliberations are legally impermissible" because they are instructed "to consider the evidence in light of ... their 'observations and experiences in life.'" Pet. Br. 22 (citation omitted). According to Petitioner, this case shows that "where jurors couch racially biased assertions in the language of past experience," they "may assume such statements, though offensive, are legally permissible." *Id.* But this criticism of juror reporting as a safeguard obviously applies to all forms of bias or juror misconduct. For example, a juror might inappropriately credit a police officer's testimony

over the defendant's because, in his experience, police officers are always more trustworthy than criminal defendants. If juror reporting is an adequate safeguard in that instance, it is an adequate safeguard here.

Indeed, this line of argument has nothing to do with racial bias at all. It is a complaint about jury instructions that do not educate the jury about the difference between personal experiences and impermissible biases. If this problem exists, then, courts can solve it by advising or admonishing the jury to refrain from all forms of misconduct, including "harassment of other jurors, alcohol or drug use, exposure to out-of-court facts (by experimentation, research, or inadvertence), or nondisclosure of bias, prejudice, or conflict." Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 Yale L.J. 187, 201-02 (1988). The trial court could even instruct the "jury at the beginning of trial on Rule 606(b)," or a state counterpart, which "would inform the conscientious juror of the court's constraints and facilitate notifying court officers of misconduct before deliberations, when they could be informed of the misconduct *and* its effects." *Id.* at 201. There is a good reason why courts "presume[] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). Instructions specifically addressing racial bias would obviate any risk—however unlikely—that jurors will not "realize that racially biased statements made during deliberations are legally impermissible." Pet. Br. 22.

2. Petitioner also argues that "where jurors perceive the impropriety of another's conduct during deliberations, they are unlikely to report it." Pet. Br. 23. Because jurors are encouraged "to behave cooperatively," he claims, they are unlikely to "formally accus[e] another juror of being a racist" because it is "particularly fraught with the possibility of stirring unwanted conflict." *Id.* In short, no juror hopes to "'confront their peers' from the witness stand concerning racially biased remarks." *Id.* (citing *Kittle*, 65 A.3d at 1155).

Like Petitioner's other arguments, however, this one is based on mistaken assumptions. Jurors do not have to "formally accuse" a juror of being racist to report bias to the court. Jurors have many confidential avenues through which they can report racial bias. They can contact the judge directly, via written or electronic communication or by telephone, and indirectly through court staff. *See, e.g.*, *McClinton*, 135 F.3d at 1184 (reporting potential racial bias to the judge directly by letter); *United States v. Machi*, 811 F.2d 991, 1005 (7th Cir. 1987) (phoning the judge at home to report misconduct); *United States v. Carey*, 337 F. App'x 256, 259 (3d Cir. 2009) (reporting to the jury clerk that jurors were prematurely discussing the merits of the case).

Nor do jurors need to take "the witness stand" to confront their peers. After learning of misconduct, courts can question jurors individually out of the presence of the others to investigate whether a particular juror is unfit to serve. *See, e.g., United States v. Heller*, 785 F.2d 1524, 1525-26 (11th Cir. 1986). This is routine; in fact, "there are times in which individual questioning is the optimal way in which to root out misconduct." *United States v. Kemp*,

500 F.3d 257, 302 (3d Cir. 2007) (collecting cases). After the individual questioning is conducted, the parties can evaluate whether they wish to have the juror dismissed for cause, and, if so, the court can then decide whether that is warranted. *See Heller*, 785 F.2d at 1525-26 (individually questioning jurors and discovering that anti-Semitic slurs occurred in the jury room); *United States v. Anello*, 765 F.2d 253, 259 (1st Cir. 1985) (individually questioning jurors, dismissing tainted jurors, and proceeding with trial). The adversarial proceeding Petitioner depicts—with jurors testifying against each other in open court—is just not reality. The only proceeding his portrayal resembles is the post-trial challenge to the verdict—where jurors testify and can expect to be cross-examined by the prosecutor—that he asks the Court to impose here.

Regardless, this argument (like the rest) fails to distinguish racial bias from other juror misconduct. If accusing a fellow juror of racial bias raises the specter of confrontation, so too does accusing someone of bias based on gender, religion, or sexual orientation—or accusing jurors of considering any other improper consideration or engaging in any other type of misconduct. If the instruction "to behave cooperatively" and "reach consensus" pressures jurors into concealing racial bias, then it pressures jurors into concealing other biases and juror misconduct as well.

3. Finally, Petitioner claims that "[o]nce a straw poll has been taken and a majority is leaning towards guilt, dissenters are incentivized to keep quiet and conform." Pet. Br. 24 (citing Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychology Perspectives 174-75, 180-84 (1988); Harry Kalven, Jr. & Hans Zeisel, The

American Jury 463 & n.9 (1966)). Here, the record refutes the suggestion that dissenting jury members kept quiet and conformed. Deliberations became heated, as the judge reported on the record, and ultimately the dissenters refused to join a guilty verdict on the most serious charge. JA 67-71. Petitioner also incorrectly assumes that juror misconduct occurs only once deliberations have begun and, even then, only once there has been a straw poll. The juror misconduct in *this* case arose during deliberations. But juror misconduct can arise at any juncture in the trial. *See, e.g.*, *Henley*, 238 F.3d at 1113-14 (juror revealed racial bias while carpooling to and from trial); *Heller*, 785 F.2d at 1525-26 (juror reported anti-Semitic slurs shortly after deliberations began); *Bryant v. Mattel, Inc.*, No. 04-CV-09049, 2008 WL 3367605, at *1-3 (C.D. Cal. Aug. 8, 2008) (juror reported comments on the defendant's ethnicity shortly after the start of the second phase of trial). And, once again, this concern applies equally to reporting all types of juror misconduct.

The lower court decisions upon which Petitioner relies do not advance his cause. Those that even address juror reporting, *see, e.g.*, *Villar*, 586 F.3d at 87 (failing to address the jury reporting protection in its analysis), declared (like Petitioner) that it does not adequately check racial bias because race is different. In *Kittle*, for example, the court simply declared that "[t]he insidiousness of racial or ethnic bias is ... distinguishable from other forms of juror misconduct or incompetence." 65 A.3d at 1155. "To hold otherwise," the court announced, would "risk violating 'the plainest principles of justice.'" *Id.* (quoting *Villar*, 586 F.3d at 84). But these broad pronouncements, devoid of any actual support, are not a legitimate basis for seeking an exception from precedent holding that "report[ing]

inappropriate juror behavior to the court before they render a verdict" safeguards a defendant's right to an impartial jury. *Tanner*, 483 U.S. at 127 (emphasis omitted).

II. The Right To An Impartial Jury Under The Sixth Amendment Must Extend Equally To All Forms Of Juror Bias.

"The Constitution guarantees both criminal and civil litigants a right to an impartial jury." *Warger*, 135 S. Ct. at 528 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946)). "The bias or prejudice of even a single juror is enough to violate that guarantee," *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000), because a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors," *Parker v. Gladden*, 385 U.S. 363, 366 (1966). That is why, as explained above, any form of bias implicates a defendant's Sixth Amendment right to an impartial jury.

The Sixth Amendment is violated, for example, by bias based on religion, *see, e.g.*, *United States v. Nelson*, 277 F.3d 164, 201-02 (2d Cir. 2002), nationality, *see, e.g.*, *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013), sexual orientation, *see, e.g.*, *United States v. Bates*, 590 F. App'x 882, 887 (11th Cir. 2014), political views, *see, e.g.*, *United States v. Nell*, 526 F.2d 1223, 1227-30 (5th Cir. 1976), prior relationships, *see, e.g.*, *Bailey v. Bd. of Cty. Comm'rs of Alachua Cty., Fla.*, 956 F.2d 1112, 1128 (11th Cir. 1992), and a prior criminal record, *see, e.g.*, *United States v. Corey*, 625 F.2d 704, 707-08 (5th Cir. 1980) (per curiam). By definition, then, adopting Petitioner's proposal would treat similarly situated defendants differently.

Those defendants claiming racial bias will be granted post-verdict rights that defendants claiming all other forms of juror bias and misconduct do not have. Nothing in the text, structure, or history of the Sixth Amendment supports the exception that Petitioner seeks.

Petitioner tries to distinguish other forms of bias "on the ground that racial bias is a more serious and fundamental danger to the justice system." *Benally*, 546 F.3d at 1240-41. But the argument is non-responsive to the interpretative question. His argument is "that Rule 606(b) is unconstitutional ... in a case where it prevents rectification of a Sixth Amendment violation." *Id.* It is thus Petitioner's burden to show how that proposition can "be confined to the context of racial prejudice." *Id.* He cannot. The Sixth Amendment does not distinguish between a defendant convicted by a juror harboring racial bias and a defendant convicted by a juror harboring religious bias. *See, e.g.*, *United States v. Abcasis*, 811 F. Supp. 828, 834-35 (E.D.N.Y. 1992) (Rule 606(b) barred post-verdict review of a juror's comment that "Jews are responsible for bringing drugs into the Black community"). Nor does the Sixth Amendment distinguish between biased jurors, on the one hand, and those who are drunk or under the influence of illegal drugs, on the other. *Tanner*, 483 U.S. at 1236 ("This Court has recognized that a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing.'" (citation omitted)).

But even if Petitioner's argument were doctrinally sound, it creates intractable line-drawing problems. Petitioner claims the "Court has repeatedly recognized that addressing the particular toxin of racial bias in the criminal justice system does not compel the judiciary to

police all potential forms of bias." Pet. Br. 42. For example, although the Court has endorsed questioning potential jurors on the issue of racial bias in some instances, it has not required courts to "permit defendants to inquire into other forms of bias—such as 'prejudice against beards' or 'a host of other possible similar prejudices.'" *Id.* at 43 (quoting *Ham*, 409 U.S. at 528).

Petitioner attacks a strawman. Perhaps "beard prejudice" exists, but it is unlikely to be a frequent or substantial concern in many cases. But the existence of other significant biases, which no doubt influence deliberations and verdicts, is unquestionable. *See generally* Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 Wm. & Mary J. Women & L. 1, 21 (2005) (outlining extensive social science research showing gender bias on juries). Studies show, for example, that women are more likely to convict defendants in rape cases. *See* Reid Hastie *et al.*, Inside the Jury 140-141 (1983). "Women have also suggested longer sentences for rape defendants than men, and women expressed greater certainty about their verdicts in rape cases." Fowler, *supra*, at 21. Men tend to "exculpate defendants by shifting blame to the victim." *Id.* And men are less likely to credit a battered woman's defense in murder cases than are women. *Id.* at 22-23. Thus, "to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact." *J.E.B.*, 511 U.S. at 149 (O'Connor, J., concurring).

The same is true for other types of bias. Studies show that discriminatory attitudes toward gays and lesbians are a factor in jury verdicts. *See generally* Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom:*

A Double Standard, 39:2 J. of Homosexuality 93 (2000). And multiple studies have shown "that defendants with one or more prior convictions are more likely to be found guilty by deliberating jurors." Dennis J. Devine *et al.*, *Jury Decision Making*, 7 Psychol. Pub. Pol'y & L. 622, 678 (2011). Indeed, a jury's knowledge of a defendant's prior conviction raises the likelihood of conviction by 40 percent. *See id.* Petitioner would ignore these difficult questions in favor of a rule that makes value judgments about particular forms of juror bias. This is neither fair nor consistent with the Sixth Amendment.

In retreat, Petitioner argues that "[e]ven when this Court has elected to extend a constitutional criminal procedure right beyond *racial* bias, it has encountered little difficulty limiting the protection to special categories of bias." Pet. Br. 43. But Petitioner's only example is the limited extension of *Batson* to gender. *See id.* That example proves the opposite. Lower courts have struggled to confine *Batson* to race and gender because the rule's underlying principle—that "prejudices often exist against particular classes in the community ... [and] operate in some cases to deny to persons of those classes the full enjoyment of [jury] protection," *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (citation omitted)—applies to peremptory strikes that target any subset of the population. *See, e.g.*, *United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003) (extending *Batson* to peremptory strikes based on religion); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014) (sexual orientation); *State v. Gould*, 322 Conn. 519, 532 (2016) (ancestry and national origin); *see also United States v. Ruiz*, 49 M.J. 340, 350 (C.A.A.F. 1998) ("Before long, *Batson* will presumably be further extended to include religion, national origin, and other classifications.").

As the trajectory of *Batson* claims demonstrates, it will be difficult (if not impossible) to confine the exception Petitioner proposes to claims of bias, let alone racial bias. There is no "principled reason to limit the exception only to claims of bias, when other types of jury misconduct undermine a fair trial as well." *Benally*, 546 F.3d at 1241. "If a jury does not follow the jury instructions, or ignores relevant evidence, or flips a coin, or falls asleep, then surely that defendant's right to a fair trial would be aggrieved." *Id.* The only viable path—if the Court accepts Petitioner's argument—is the creation of a full-scale Sixth Amendment exception to Rule 606(b) for all instances of juror misconduct. In other words, the Court would need to overturn *Tanner* and *Warger* in deed if not in name; there would be "nothing left of the Rule, and the great benefit of protecting jury decision-making from judicial review would be lost." *Id.*

That would be an unwise step for the Court to take. Though overturning these cases might "in some instances lead to the invalidation of verdicts reached after irresponsible or improper jury behavior," *Tanner*, 483 U.S. at 120, "[i]t is not at all clear ... that the jury system could survive such efforts to perfect it," *id.* It remains as true today as the day *Tanner* was decided that "[a]llegations of juror misconduct ... raised for the first time days, weeks, or months after the verdict seriously disrupt the finality of the process." *Id.* And it is still true that "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at 120-21. "[M]ore than 150,000 jury trials take place each year in the United States" with the

accompanying "[h]undreds of thousands of U.S. Citizens" serving on those juries. Devine, *supra*, at 622. Permitting a post-verdict inquiry into jurors' deliberations would undermine the jury system. The Court should once again reject an attempt to start down that path.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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